Yazid bin Sufaat & Ors v Suruhanjaya Pilihanraya Malaysia

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08(F)–21 OF 2009(W)
ALAUDDIN PCA, MOHD GHAZALI AND HASHIM YUSOFF FCJJ
28 AUGUST 2009

Administrative Law — Judicial review — Application for — Whether applicants had exhausted all remedies available under statute prior to applying for judicial review

Constitutional Law — Fundamental liberties — Right to vote — Right to vote subject to limitations imposed by statute and regulations — Applicants detained under the Internal Security Act 1960 — Whether applicants entitled to vote as postal voters — Conditions to be satisfied before being entitled to vote as postal voters — Whether applicants denied of right to vote — Federal Constitution art 119 — Election (Postal Voting) Regulations 2003 reg 3(2), (3) & (4)

The applicants were Malaysian citizens who were registered voters in various constituencies. They were all detainees under the Internal Security Act 1960 ('ISA') at Pusat Tahanan Kamunting, Perak ('the said detention centre'). The respondent had issued a notice fixing 13 March 2004 as nomination day and 21 March 2004 as the polling day for the 11th general elections. By letter dated 15 March 2004, an organisation called 'Gerakan Mansuhkan ISA' ('GMI') informed the respondent that the applicants wished to be supplied with postal ballot papers to enable them to cast their votes on the polling. Two further letters were sent by GMI to the respondent on the same issue. The said general elections were held on 21 March 2004, but the applicants were not able to cast their votes. This, according to the applicants, amounted to a denial of their rights to vote pursuant to art 119 of the Federal Constitution ('Constitution'). The applicants subsequently filed an application for judicial review in the High Court claiming, inter alia, that their fundamental right to vote under art 119 had been violated by the respondent. The High Court dismissed the application. Their appeal to the Court of Appeal was also dismissed. The applicants then filed this application for leave to appeal to the Federal Court under s 96(a) of the Courts of Judicature Act 1964.

Held, dismissing the application with costs:

(1) The applicants did not fall within the definition of 'absent voter' under reg 2 of the Elections (Registration of Electors) Regulations 2002. As such, the only remedy that was left to the applicants was under reg 3(1) of the Elections (Postal Voting) Regulations 2003 ('Regulations'). As the applicants were being detained in custody and not being persons disqualified pursuant to art 119(3) of the Constitution, they were entitled to vote if they fell within a category of persons designated as postal voters by the respondent by notification in the *Gazette*. That was the step that they had to clear before being entitled to vote as postal voters. Once they fell within such category and desired to vote by post, they would then need to comply with reg 3(2), (3) and (4) of the said Regulations. It is only upon approval that the returning officer would issue to such an applicant a postal ballot paper (see para 29).

(2) The applicants had not exhausted all the remedies available to them under the statute and the various regulations made thereunder, prior to making an application for judicial review. They could not complain about being deprived of their constitutional right to vote when they failed to avail themselves of the legal remedies so available (see para 30).

(3) The right to vote is subject to the limitations imposed by statute and the regulations made thereunder and such right can only be exercised in the manner provided by statute and the regulations made thereunder (see para 32).

(4) The applicants had not been prohibited by the respondent from voting at the respective polling stations which contained their names in the electoral roll. The applicants' intended appeal had no prima facie case for success. This was not a proper case in which leave to appeal should be granted (see para 33).

[Bahasa Malaysia summary

Pemohon-pemohon adalah warganegara Malaysia yang merupakan pengundi berdaftar di pelbagai kawasan. Kesemua mereka merupakan tahanan di bawah Akta Keselamatan Dalam Negeri 1960 ('ISA') di Pusat Tahanan Kamunting, Perak ('pusat tahanan tersebut'). Responden telah mengeluarkan notis menetapkan 13 Mac 2004 sebagai hari pencalonan dan 21 Mac 2004 sebagai hari mengundi untuk pilihan raya umum kesebelas. Melalui surat bertarikh 15 Mac 2004, satu organisasi dikenali sebagai 'Gerakan Mansuhkan ISA' ('GMI') memaklumkan kepada responden bahawa pemohon-pemohon berhasrat untuk dibekalkan dengan kertas undi pos untuk membolehkan mereka membuang undian mereka. Dua lagi surat dihantar oleh GMI kepada responden mengenai isu yang sama. Pilihan raya umum dijalankan pada

21 Mac 2004, tetapi pemohon-pemohon tidak dapat membuang undi. Ini, menurut pemohon-pemohon, merupakan penafian hak mereka untuk mengundi menurut perkara 119 Perlembagaan Persekutuan ('Perlembagaan'). Pemohon-pemohon kemudiannya memfailkan satu permohonan untuk semakan kehakiman di Mahkamah Tinggi mendakwa, antara lain, bahawa hak asasi mereka untuk mengundi di bawah perkara 119 telah dicabuli responden. Mahkamah Tinggi menolak permohonan mereka. Rayuan mereka ke Mahkamah Rayuan juga ditolak. Pemohon-pemohon kemudiannya memfailkan permohonan untuk kebenaran merayu ke Mahkamah Persekutuan di bawah s 96(a) Akta Mahkamah Kehakiman1964.

Diputuskan, menolak permohonan dengan kos:

(1) Pemohon-pemohon tidak termasuk dalam definisi 'absent voter' di bawah peraturan 2 Peraturan-Peraturan Pilihanraya (Pendaftaran Pengundi) 2002. Oleh itu, satu-satunya remedi yang tinggal untuk pemohon-pemohon ialah di bawah peraturan 3(1) Peraturan-Peraturan Pilihanraya (Pengundian Pos) 2003 ('Peraturan-Peraturan). Memandangkan pemohon-pemohon adalah ditahan dalam jagaan dan bukannya orang-orang yang tidak layak menurut perkara 119(3) Perlembagaan, mereka berhak untuk mengundi sekiranya mereka termasuk dalam kategori orang yang dibolehkan untuk menjadi pengundi pos oleh responden melalui pemberitahuan dalam *Warta*. Itu merupakan langkah-langkah yang perlu dipenuhi mereka sebelum berhak mengundi sebagai pengundi pos. Apabila mereka termasuk dalam kategori tersebut dan mahu mengundi melalui pos, mereka perlu mematuhi peraturan 3(2), (3) dan (4) Peraturan-Peraturan tersebut. Hanya apabila kebenaran diberikan maka pegawai pilihan raya akan memberikan kertas undi pos kepada pemohon (lihat perenggan 29).

(2) Pemohon-pemohon tidak mengunakan kesemua remedi yang diberikan kepada mereka di bawah statut dan pelbagai peraturan yang dibuat di dalamnya, sebelum membuat permohonan untuk semakan kehakiman. Mereka tidak boleh mengadu dinafikan hak perlembagaan mereka untuk mengundi apabila mereka gagal untuk menggunakan remedi-remedi undang-undang yang ada (lihat perenggan 30).

(3) Hak untuk mengundi adalah tertakluk kepada had yang ditetapkan oleh statut dan peraturan-peraturan yang dibuat di dalamnya dan hak tersebut hanya boleh dilaksanakan dalam cara sepertimana yang diperuntukkan oleh statut dan peraturan-peraturan yang dibuat di dalamnya (lihat perenggan 32).

A (4) Pemohon-pemohon tidak dihalang oleh responden daripada mengundi di pos-pos mengundi yang mengandungi nama mereka dalam daftar pengundi. Rayuan pemohon-pemohon tiada kes prima facie untuk berjaya. Ini bukanlah satu kes di mana kebenaran untuk merayu seharusnya dibenarkan (lihat perenggan 33).]

B

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

For cases on fundamental liberties generally, see 3(1) *Mallal's Digest* (4th Ed,
C 2006 Reissue) paras 2001–2183.

Cases referred to

Anukul Chandra Pradhan v Union of India AIR 1997 SC 2814 (refd)

Datuk Syed Kechik bin Syed Mohamad & Anor v The Board of Trustees of the
D *Sabah Foundation & Ors and another application* [1999] 1 MLJ 257, FC (refd)

Joceline Tan Poh Choo & Ors v V Muthusamy [2008] 6 MLJ 621, FC (refd)

Legislation referred to

E Courts of Judicature Act 1964 s 96(a)
Elections Act 1958 ss 5, 5(1)(a), 15, 16
Elections (Conduct of Elections) Regulations 1981 reg 14A
Elections (Postal Voting) Regulations 2003 regs 2, 3, 3(1), (1)(f), (2), (3), (4), Form 1
F Elections (Registration of Electors) Regulations 2002 regs 2, 5
Federal Constitution arts 8, 10(1)(a), 113, 114, 115, 119, 119(3)
Internal Security Act 1960
Representation of the People Act 1951 [IND] s 62(5)

G **Appeal from**: Civil Appeal No W-01–29 of 2006 (Court of Appeal, Putrajaya)

Edmund Bon Tai Soon (Sunil Lopez, Syamsuria Tina Ishak and Roger Chan Weng Keng with him) (Chooi & Co) for the applicants.

H *Azizah Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the respondent.*

Mohd Ghazali FCJ (delivering judgment of the court):

I **[1]** This is an application for leave to appeal from the decision of the Court of Appeal under s 96(a) of the Courts of Judicature Act 1964 ('CJA'). It came up before us on 22 May 2009. We had in a unanimous decision dismissed it with costs.

[2] The applicants are Malaysian citizens and are registered voters in various constituencies. They are all detainees under the Internal Security Act 1960 ('ISA') at Pusat Tahanan Kamunting, Perak ('the said detention centre'). A

[3] The respondent is the Election Commission, constituted in accordance with art 114 of the Federal Constitution and pursuant to art 113 of the Federal Constitution is charged with the responsibility of conducting elections to the House of Representatives and the Legislative Assemblies of the states and prepare and revise electoral rolls for such elections. B

[4] Learned counsel for the applicants intimated that there are six proposed questions of law which require a determination by this court and that these questions, if answered, will finally determine the matter and reverse the decision of the Court of Appeal; the questions formulated were as follows: C

(a) Whether under Part VIII (in particular art 119) of the Federal Constitution and reg 5 of the Elections (Registration of Electors) Regulations 2002, detainees who have not been convicted and are held under preventive detention laws such as the Internal Security Act 1960 but are not otherwise disqualified to vote ('the detainees'), entitled to exercise their constitutional right to vote while in detention. D E

(b) Whether under Part VIII (in particular arts 113, 114 and 115) of the Federal Constitution read with the Election Act 1958 (in particular ss 5, 15 and 16) and Elections (Registration of Electors) Regs 2002 (in particular reg 5), the Election Commission is under a duty, obligation or responsibility to enact the necessary and appropriate rules, regulations and procedures for registration to facilitate and allow for the exercise of the detainees' constitutional right to vote while in detention. F

(c) Whether under Part VIII (in particular arts 113, 114 and 115) of the Federal Constitution read with the Election Act 1958 (in particular ss 5, 15 and 16) and Elections (Registration of Electors) Regulations 2002 (in particular reg 5), the Election Commission is under a duty, obligation or responsibility to include those who are detained under preventive detention laws such as the Internal Security Act 1960 (eg the detainees), as persons who are not residents in the constituency in which they are detained (ie, Kamunting, Taiping), as a category of persons who may be registered as 'absent voters' pursuant to reg 2 of the Elections (Registration of Electors) Regulations 2002 to facilitate and allow for the exercise of the detainees' constitutional right to vote while in detention. G H I

(d) Whether the detainees may be designated as 'postal voters' by the Election Commission under reg 3(1)(f), Elections (Postal Voting) Regulations 2003 read with reg 3(2) and Form 1 in the Schedule (with the accompanying certificate).

(e) Whether the failure, neglect or refusal of the Election Commission to enact the necessary and appropriate rules, regulations or procedures for registration to facilitate and allow for the exercise of the detainees' constitutional right to vote while in detention amounted to a breach of its said duty, obligation or responsibility.

(f) Whether the absence of the necessary and appropriate rules, regulations or procedures for registration to facilitate and allow for the exercise of the detainees' constitutional right to vote while in detention amounted to a breach of the detainees' constitutional rights under arts 8 and/or 10(1)(a) and/or 119 of the Federal Constitution.

[5] Learned counsel for the applicants argued that pure questions of law as to the scope and nature of the respondent's duty and obligations vis-a-vis persons held in preventive detention arose in the proceedings in the High Court and Court of Appeal.

[6] With regards to question (a) as proposed, learned counsel pointed out that the issue to be determined is whether a person detained under the ISA is qualified to exercise his right to vote despite being held in a detention centre and that questions (b), (c), (d), (e) and (f) follow as to the mode in which a detainee may exercise his right to vote while in detention.

THE BACKGROUND

[7] Parliament and the State Legislative Assemblies (except for Sarawak) were dissolved on 4 March 2004 paving the way for the 11th General Election ('the said general elections'). The respondent subsequently issued a notice which was gazetted on 7 March 2004 fixing 13 March 2004 as nomination day and 21 March 2004 as the polling day for the said general elections.

[8] By letter dated 15 March 2004, ie, about two days after nomination day, an organisation going by the name of 'Gerakan Mansuhkan ISA' ('GMI') informed the respondent that they received requests from persons who are Malaysian citizens and detained under the ISA who intimated that they wish to be supplied with postal ballot papers to enable them to cast their votes on polling day, viz, 21 March 2004.

[9] Subsequently, by letter dated 17 March 2004 addressed to the respondent, GMI made reference to their earlier letter and supplied a list of names of 90 detainees which included the applicants and reiterating the same request, viz, to supply these detainees with postal ballot papers. GMI further intimated that they will take legal action if the request is ignored. They wrote a similar letter to the respondent on 20 March 2004, ie, one day before the said general elections.

[10] The said general elections were held on 21 March 2004, but the applicants could not and were not able to cast their votes. This, according to the applicants, amounted to a denial of their rights to vote pursuant to art 119 of the Federal Constitution; art 119 reads:

> (1) Every citizen who —
>
> (a) has attained the age of twenty-one years on the qualifying date;
>
> (b) is resident in a constituency on such qualifying date or, if not so resident, is an absent voter; and
>
> (c) is, under the provisions of any law relating to elections, registered in the electoral roll as an elector in the constituency in which he resides on the qualifying date,
>
> is entitled to vote in that constituency in any election to the House of Representatives or the Legislative Assembly unless he is disqualified under Clause (3) or under any law relating to offences committed in connection with elections; but no person shall in the same election vote in more than one constituency.
>
> (2) If a person is in a constituency by reason only of being a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or of being detained in custody he shall for the purposes of Clause (1) be deemed not to be resident in that constituency.
>
> (3) A person is disqualified for being an elector in any election to the House of Representatives or the Legislative Assembly if —
>
> (a) on the qualifying date he is detained as a person of unsound mind or is serving a sentence of imprisonment; or
>
> (b) having before the qualifying date been convicted in any part of the Commonwealth of an offence and sentenced to death or imprisonment for a term exceeding twelve months, he remains liable on the qualifying date to suffer any punishment for that offence.

(4) In this Article —

(a) 'absent voter' means, in relation to any constituency, any citizen who is registered as an absent voter in respect of that constituency;

(b) 'qualifying date' means the date on which a person applies for registration as an elector in a constituency, or the date on which he applies for the change of his registration as an elector in a different constituency,

in accordance with the provisions of any law relating to elections.

JUDICIAL REVIEW

[11] The applicants subsequently filed an application for judicial review in the Kuala Lumpur High Court and sought the following reliefs:

(a) a declaration that their fundamental right to vote under art 119 of the Federal Constitution in the said general elections has been violated by the respondent;

(b) a declaration that their fundamental right to freedom of speech and expression under art 10(1)(a) of the Federal Constitution in the said general elections has been violated by the respondent;

(c) a declaration that their fundamental right to equal protection under the law under art 8 of the Federal Constitution in the said general elections has been violated by the respondent;

(d) an order of certiorari to quash the decision and action of the respondent to their refusal, denial and neglect to enable and to allow them to vote in the said general elections; and

(e) for punitive, aggravated and exemplary damages.

[12] The High Court dismissed the application with costs. Their appeal to the Court of Appeal was also dismissed with costs in a majority judgment.

[13] The applicants then filed this application for leave to appeal to this court under s 96(a) of the CJA; s 96 reads:

Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided

for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage;

[14] In *Datuk Syed Kechik bin Syed Mohamad & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257, in dealing with s 96(a) of the CJA, Edgar Joseph Jr FCJ in delivering the judgment of this court said (at p 265):

> To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to grant leave to appeal in civil cases sparingly and will not grant such leave unless both of the following criteria are satisfied by an intending appellant:
>
> (1) the judgment of the Court of Appeal has raised a point of general principle *which the Federal Court has not previously decided* or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and
>
> (2) if the point is decided in favour of the intending appellant, there is a prima facie case for success in the appeal. (Emphasis added.)

[15] In *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621, Augustine Paul FCJ was of the view that the use of the words 'which the Federal Court has not previously decided' in criteria (1) in the judgment of this court in *Datuk Syed Kechik*, may not be an accurate representation of s 96(a). He was of the opinion that the words 'which the Federal Court has not previously decided' in criteria (1) ought to be replaced with the words 'decided by the Court of Appeal for the first time' as contemplated by s 96(a). His Lordship said that 'that will remove any confusion that may arise and, additionally, bring into proper focus the underlying distinction between both the limbs. His Lordship then pointed out that s 96(a) contains two circumstances in which an appeal may be made to this court, namely:

(i) limb (a) question of general principle decided for the first time;

(ii) limb (b) question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

His Lordship then went on to say (at pp 632–633):

> It is thus clear that both limb (a) and limb (b) are separate and as they cater for two distinct circumstances they are mutually exclusive.
>
> In an application for leave to appeal an intending appellant must identify the proper limb under which his case falls and address the arguments accordingly.

The next matter for consideration is whether the point if decided in favour of the intending appellant will show that there is a prima facie case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment. It is only then that the question of success in the appeal can arise. It must be remembered that the very object of making appeals to this court subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v OCBC Bank (M) Bhd* [1998] 3 MLJ 78). Leave to appeal on a proposed question will therefore not be granted if there is no hope of success (see *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681).

[16] In the High Court, the learned judge made the following findings:

(a) the applicants were registered as electors during the said general elections and hence entitled to vote;

(b) being detainees under the ISA the applicants are not convicted prisoners serving sentences of imprisonment and thus are not disqualified from voting in the said general elections, viz, they have a constitutional right to vote;

(c) however, their rights to vote must be at the particular constituency where they have registered themselves as electors;

(d) the applicants were not registered as postal voters.

[17] Under reg 3(1) of the Election (Postal Voting) Regulations 2003 ('the Regulations') there are six instances where persons are entitled to vote as postal voters; it reads:

3(1) Any person who has registered as a Parliamentary or State elector under the Elections (Registration of Electors) Regulations 2002, and is —

(a) an absent voter;

(b) a person certified by the Election Commission to be an election officer and liable for duties on polling day;

(c) a member of any police force established by any written law in force in Malaysia, other than a member of the Police Volunteer Reserve Force;

(d) a member of any of the public services who on polling day is employed full-time in a post outside Peninsular Malaysia or Sabah or Sarawak;

(e) a member of the Election Commission appointed under Article 114 of the Federal Constitution; or

(f) a member of any category of persons designated as postal voters by the Election Commission from time to time by notification in the *Gazette*,

shall, on receipt of a postal ballot paper, be entitled to vote as a postal voter at an election in accordance with these Regulations.

(2) A person referred to in paragraphs (1)(b), (d), (e) and (f) desiring to vote by post shall apply to do so by using Form 1 in the Schedule.

(3) The application shall be made direct to the returning officer of the constituency in which he is registered through any State Elections Officer of a State as soon as it is known that an election is contested in that constituency.

(4) If an application is approved, the returning officer shall issue a postal ballot paper to the applicant and if it is not approved, the returning officer shall so inform the applicant and shall state his grounds for not approving the application in the letter prescribed in Form 1.

Regulation 2 of the said Regulations provides a 'postal ballot paper' means a ballot paper issued to a postal voter and a 'postal voter' means any person entitled to vote under reg 3. Form 1 appearing in the Schedule to the said Regulations is the form to be used in an application for a postal ballot paper.

[18] In his grounds of judgment, with regards to reg 3 of the said Regulations, the learned judge of the High Court said:

Clearly from the above, the applicants are not qualified to be postal voters under sub-paras (a) to (e). The only provision under which they can apply to be postal voters is under sub-reg (f). But as pointed (out) by the Commission the applicants have never made any formal application to be registered as postal voters under reg 3(1)(f) of the Election (Postal Voting) Regulations 2003. Even, If the letters from the applicants can be said to [be] an implied application to the Commission to treat the (sic) them as postal voters, it is too late for the Commission to take the necessary actions. The Commission only received the first letter on 18 March 2004. Under reg 14A of the Elections (Conduct of Elections) Regulations 1981 the authoritative text of the electoral rolls must be submitted to the candidates on the day of nomination. The nomination day in the previous general election was 13 March 2000. Thus, the authoritative text should contain the names of the applicants as regular voters in the constituencies where they have registered. Therefore, since the applicant are not postal voters, there was no violation of their rights when the Commission did not provide them with the postal ballot papers. The applicants are all regular votes (sic) and have to (be) personally present at the respective constituencies in order for them to vote.

[19] In the majority judgment of the Court of Appeal, the court made the following findings:

(a) the applicants, who are registered voters and not being convicted prisoners serving sentences, have the constitutional right under art 119 of the Federal Constitution to vote in the constituency where they have respectively registered themselves as voters;

(b) the applicants' status as ISA detainees and the prohibition against them to leave the detention centre is an entirely different matter which is obviously beyond the respondent's jurisdiction, powers, duties and responsibilities;

(c) the respondent does not and cannot exercise any jurisdiction over the applicants as ISA detainees; the respondent is in no position whatsoever to allow or refuse the applicants to leave the detention centre, either for the purpose of casting their votes in the said general elections or for any other purpose;

(d) for the applicants to cast their votes as postal voters, they have to come within the purview of reg 3 of the said Regulations;

(e) as ISA detainees, the applicants may, where appropriate, invoke reg 3(2) of the said Regulations and apply to vote by post, by using Form 1 in the Schedule thereto but did not do so; they have instead through the GMI written letters dated 15 and 17 March 2004 to the respondent requesting for postal ballot papers thus implying that the applicants be treated as postal voters by the respondent;

(f) the letters referred to in para (e) above were written after 13 March 2004 which was the nomination day for the said general elections;

(g) Regulation 14A of the Elections (Conduct of Elections) Regulations 1981 provides that the electoral rolls which are submitted to the candidates on the day of nomination shall be the authoritative text of the electoral rolls which will be used by the returning officer and the presiding officer of a polling station on polling day; in the instant case the day of nomination was 13 March 2004 and as the applicants' letters dated 15 and 17 March 2004 were written to the respondent after the nomination day, the applicants cannot legally be included in the electoral rolls in order to become postal voters for the said general elections; and

(h) the applicants remain as walk-in voters who have to be personally present at their respective constituencies to cast their vote and their inability to cast their votes as walk-in voters was not caused by the act or omission of the respondent.

[20] The Court of Appeal concluded that under the circumstances discussed above:

(a) the applicants' complaint of the violation of their rights to vote as walk-in or postal voters is wholly without merits;

(b) the respondent had never deprived the applicants of their right to vote, nor was there any discrimination against them;

(c) the applicants' detention in the said detention centre pursuant to the ISA has nothing to do with the respondent;

(d) the learned judge of the High Court was correct in ruling that it is not the respondent's responsibility to ensure that all registered voters cast their votes on polling day, as voting is not compulsory in Malaysia.

[21] In her dissenting judgment, Zainon Ali JCA said:

> Inasmuch as I am conscious of the need to strictly comply with the strict provision of the Election laws and rules, there is also a compelling need for the EC to reciprocate by responding speedily and responsibly when requests are made by electors (such as the appellants) to exercise their right to vote. For the EC to ignore and disregard this, manifests unreasonableness on their part. And for learned trial judge to decide the way he did, meant that his findings of fact are flawed and consequently his rulings of law, misdirected.
>
> In the circumstances, the decision of the learned trial judge has occasioned a miscarriage of justice. Thus the relief(s) prayed for are granted to the appellants.

[22] In canvassing the application, learned counsel for the applicants concede that if the applicants did not apply for postal voter status, they cannot complain. He however asserted that leave should be granted as the matter is in the public interest, that the issue has been raised for the first time and that there is a prima facie chance of success.

[23] With regards to question (a) as formulated in his application, counsel submitted that 'this question is at the heart of the applicants' judicial review action at the High Court' and that questions (b), (c), (d), (e) and (f) 'are premised on an affirmative answer of this question'. Counsel then explained that in short, the issue to be determined is whether an ISA detainee is qualified to exercise his right to vote despite being held in a detention centre and if so, the rest of the questions follow as to the mode in which the detainee may exercise his right to vote while in detention.

[24] Counsel then pointed out that it is not the applicants' position that the respondent must physically transport the applicants to their respective constituencies to enable them to cast their votes, but it is their position:

(a) that as detainees held under the ISA, there is no provision for them to apply as postal voters or to be certified as postal voters by the respondent;

(b) that even though they should be allowed to exercise their right to vote while in detention, the respondent has failed, refused and/or neglected to facilitate the exercise of this right;

(c) that the wide powers of the respondent should have been utilised, for example, to categorise the detainees as 'absent voters' pursuant to reg 2 of the Elections (Registration of Electors) Regulations 2002 or as 'postal voters' pursuant to the said Regulations or to exempt them from the obligation to vote in the constituency they were registered in.

[25] Counsel then pointed out that the crux of the respondent's response is that the respondent has no duty, obligation, responsibility and/or power to facilitate the detainees in exercising their right to vote by including them as part of the appropriate categories of 'absent voters' or 'postal voters'. As such, the proposed questions have been formulated to determine whether the respondent's stance in this respect is correct and legally sustainable, having regard to arts 113, 114, 115 and 119 of the Federal Constitution, read with ss 5, 15 and 16 of the Elections Act and the respective elections regulations.

[26] We would think that the main complaint of the applicants is that being detainees under the ISA they are not allowed to leave the said detention centre to enable them to cast their votes in their respective constituencies where they are registered as voters and based upon this premise, they concluded that the respondent had not performed its duty or exercised its power to register them as postal voters so as to enable them to vote.

[27] Section 5(1)(a) of the Elections Act 1958 provides, inter alia, that the respondent shall exercise control and supervision over the conduct of elections and the registration of electors on the electoral rolls. Section 16 of the same provides that the respondent may with the approval of the Yang di-Pertuan Agong make regulations relating to the conduct of elections including prescribing the facilities to be provided for voting by post and the person entitled to vote by post.

[28] Regulation 2 of the Elections (Registration of Electors) Regulations 2002 read as follows:

'absent voter' means a citizen who has attained the age of twenty-one years on the qualifying date and is —

(a) a serving member of any regular naval, military or air force of Malaysia, the Commonwealth or other country;

(b) the spouse of a serving member of any force referred to in paragraph (a), who elects to become an absent voter;

(c) in the public service of the Government of Malaysia or of any State or in the service of any local authority or statutory authority exercising powers vested in it by Federal or State law, who is on duty outside the boundaries of Peninsular Malaysia or Sabah or Sarawak;

(d) the spouse of a person in the public service of the Government of Malaysia or of any State or in the service of any local authority or statutory authority exercising powers vested in it by Federal or State law who is living with her or his husband or wife outside the boundaries of Peninsular Malaysia or Sabah or Sarawak at the date of application for registration as a Parliamentary or State elector;

(e) engaged in full-time studies at any university, training college or any higher educational institution outside the boundaries of Peninsular Malaysia or Sabah or Sarawak; or

(f) the spouse of a person engaged in full-time studies at any university, training college or any higher educational institution outside the boundaries of Peninsular Malaysia or Sabah or Sarawak who is living with her or his husband or wife at the date of application for registration as a Parliamentary or State elector.

Regulation 5 provides any registered voter shall be entitled to vote at a Parliamentary or state election.

[29] The applicants do not seem to fall within the definition of 'absent voter'. As such, it is our view that the only remedy that was left to the applicants would be under reg 3(1)(f) of the said Regulations. The applicants are detainees under the ISA. According to the *Concise Oxford Dictionary* (9th Ed) the word 'detain' means 'keep in confinement or under restraint' and the word 'detainee' means 'a person detained in custody, esp for political reasons'. In *Anukul Chandra Pradhan v Union of India* AIR 1997 SC 2814, Verma CJI said (at p 2816):

> However, for the purpose of the present challenge, it is sufficient to say that preventive detention differs from imprisonment on conviction or during investigation of the crime of an accused which permits separate classification of the detenus under preventive detention. Preventive detention is to prevent breach of law while imprisonment on conviction or during investigations is subsequent to

A the commission of the crime. This distinction permits separate classification of a person subjected to preventive detention.

As the applicants are being detained in custody and not being persons disqualified pursuant to art 119(3) of the Federal Constitution, they would B be entitled to vote if they fall within a category of persons designated as postal voters by the respondent by notification in the *Gazette*. That would be the step that they must clear before being entitled to vote as postal voters. Once they fall within such category and desire to vote by post, they would then need to comply with reg 3(2), (3) and (4) of the said Regulations. It is only C upon approval that the returning officer would issue to such an applicant a postal ballot paper.

[30] What is clear to us is that the applicants have not exhausted all the remedies available to them under statute and the various regulations made D thereunder, discussed earlier, prior to making an application for judicial review. We do not think that they can complain about being deprived of their constitutional right to vote when they failed to avail themselves of the legal remedies so available.

E

[31] We do not agree with the views of Zainun Ali JCA in her dissenting judgment. The applicants never made any formal application to the respondent to be included as a category of persons who can be designated as postal voters. Failing to do that, they cannot expect the respondent to ignore F the requirements of reg 3 of the said Regulations and give in to the demand made by GMI on their behalf by supplying them with postal ballot papers as indirectly suggested in the judgment of Zainun Ali JCA just because there was no response to the said letters written by GMI.

G

[32] We noticed that the questions formulated by the applicants in this application under s 96(a) of the CJA seem to lean heavily on alleged deprivation of constitutional rights when these rights were not really in issue under the circumstances. Under the said Regulations, the respondent would H not be able to supply the applicants with postal ballot papers as they have not been designated as such pursuant to reg 3(1) of the said Regulations, discussed earlier. These are limitations imposed by statute and regulations. The circumstances surrounding the application for judicial review, namely, the right to be registered as a postal voter and the right to vote as a postal I voter cannot be made with reference to fundamental rights under the Federal Constitution. In *Anukul Chandra Pradhan v Union of India* a challenge was made to the constitutional validity of s 62(5) of the Representation of the People Act 1951. Section 62(5) of the Representation of the People Act 1951 reads:

No person shall vote at any election if he is confined In a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.

In delivering the judgment of the Supreme Court, Verma CJI said (at p 2817):

lt may also be mentioned that the nature of right to vote has been held to be a statutory right and not a common law right because of which it depends on the nature of right conferred by the statute. In *NP Ponnuswami v Returning Officer, Namakkal Constituency,* 1952 SCR 218 at p 236; (AIR 1952 SC 64 at p 71), the Constitution Bench held:

The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

In *Jumuna Prasad Mukhariya v Lachhi Ram* (1955) 1 SCR 608 at p 610; (AIR 1954 SC 686 at p 688), the Constitution Bench reiterated:

... The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute...

In *Jyoti Basu v Debi Ghosal* (1982) 1 SCC 691 at p 696; (AIR 1982 SC 983 at p 986), the law on the point was restated, thus:

The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the court in *NP Ponnuswami v Returning Officer, Namakkal Constituency* 1952 SCR 218; (AIR 1952 SC 64) and *Jagan Nath v Jaswant Singh* 1954 SCR 892; (AIR 1954 SC 210). We proceed to state what we have gleaned from what has been said, so much as necessary for this case.

A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to dispute an election. Outside of statute, there is no right to elect, creations they are, and therefore, subject to statutory limitation.

In view of the settled law on the point, it must be held that the right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute; and that the challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a fundamental right in the Constitution. The very basis of challenge to the validity of sub-s (5) of s 62 of the Act is, therefore, not available and this petition must fail.

A We are of the same view. In the Malaysian context, the right to vote is also subject to the limitations imposed by statute and the regulations made thereunder and that such right can only be exercised in the manner provided by statute and the regulations made thereunder.

B **[33]** In conclusion, we would say that it has not been shown that the judgment of the Court of Appeal has raised a point of importance upon which further argument and a decision of this court would be to the public advantage. The applicants have not been prohibited by the respondent from voting at the respective polling stations which contain their names in the C electoral roll. The applicants' intended appeal has no prima facie case for success. As such, we were of the unanimous view that this was not a proper case in which leave to appeal should be granted by this court. The application was dismissed with costs. Deposit to the respondent to account of taxed costs.

D *Application dismissed with costs.*

Reported by Kanesh Sundrum

E

F

G

H

I